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IN THE

Supreme Court of the United States

October Term, 1963

No. 464

In the Matter of
SADIE H. MARKHAM,
Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Argument

Petitioner submits this Reply Brief to correct several mis-statements of law and incorrect interpretations of the facts set forth in the respondent's Brief in Opposition to the Petition for Writ of Certiorari.

At page 2 of the Brief in Opposition, respondent suggests that the constitutional questions set forth as Questions 1, 2 and 3 of the Petition "have no reference whatever to the question decided by the North Carolina Supreme Court, whose Opinion is here sought to be reviewed."

Respondent completely misses the point. It is not necessary for certiorari to issue that the North Carolina Supreme Court have "reached or passed upon" Federal constitutional questions. In 28 U. S. C., §1257(3), jurisdiction is conferred upon this Court to review the final judgments of the highest court of a State "by writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * or where any title, right, privilege

or immunity is specially set up or claimed under the Constitution."[1]

A municipal ordinance is a "state statute" within the meaning of this section. *Jamison* v. *Texas*, 318 U. S. 413 (1943). Federal constitutional questions were clearly drawn in the Supreme Court of North Carolina (R. 140, 142). As we pointed out extensively in our Petition (pp. 19-37), the fact that the Supreme Court of North Carolina chose to ignore the constitutional questions (though conceding such was the "real controversy," App. B to Pet., p. 15a) does not deprive this Court of jurisdiction to determine those questions. We need not repeat here the argument developed in the Petition that the "adequate state ground" rule has no application in this case. We believe it of great significance, however, that respondent's Brief in Opposition cites no case in opposition to the legal theories presented and cases cited in our Petition on this point. Respondent's discussion of the issue, in fact, is confined to about one page of the brief.

At pages 2 and 3 of the Brief, respondent attempts to challenge the arbitrary character of the zoning ordinance involved by pointing out that petitioner's property has sufficient area to erect two single family residences on Tract 1; 13 single family residences on Tract 3; a 10 or 15-unit apartment building on Tract 2; and a 20 to 30-unit building on Tract 4. Respondent begs the question. The issue is not whether petitioner or her lessee could erect residence units on these tracts, and if so, how many. The issue is whether, in view of the commercial character of the sur-

[1] Rule 19 of the Rules of this Court provide that the cases to be considered for a writ of certiorari include a situation "where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court." Here, a state court, the Superior Court of Durham County, decided the case in a manner squarely in conflict with the decision of this Court in *Nectow* v. *Cambridge*, 277 U. S. 183 (1928).

rounding area, any reasonable person would desire to *reside in* such units; in other words, whether the property has any *value* for residential use. The uncontradicted evidence is that it does not, as indicated by the unchallenged opinions of seven real estate experts (R. 76-79, R. 84-86, R. 4-5). Corroborating these opinions is a mass of photographic evidence (Exhs. 4-B, 4-C, 4-D, 4-E, 4-F, 28-38) depicting the character of the neighborhood. It is obvious from these photographs alone that residence units on petitioner's property would have no appeal for a prospective buyer or tenant.

Finally, on this point, respondent is in error when it contends (Br., p. 3) that "these facts" (the number of houses or apartments which could be erected on petitioner's land) "were before the City Council." The official record of the Council meetings contains no reference to discussion of such facts (R. 91-98) and, indeed, there was no discussion of them until oral argument in the North Carolina Supreme Court; they are before this Court only "by computation." Respondent has gone outside the record in advancing this argument.

At page 4 of the Brief, respondent charges that petitioner's argument "gives no weight to the effect of North Carolina General Statutes 1-134.1, which provides that any interested party shall have the right of appeal from an adverse ruling as to the *jurisdiction of the court over the person or property of the defendant*" (Emphasis added). This contention may be summarily dismissed. At no stage of this case has respondent challenged (or any court ruled upon) the jurisdiction of the court over the person or property of the defendant, implying improper service of process; respondent's challenge has been to the *jurisdiction of the court over the subject matter of the action*, to which G.S. 1-134.1 does not apply.

In suggesting in accord with the North Carolina Supreme Court's observation that there are appropriate pro-

cedures by which petitioner could have contested the ordinance in question, respondent cites *Nectow* v. *Cambridge*, *supra*, as a proper example for her to follow (Br., pp. 4-5). Obviously, the procedures available to an aggrieved landowner in Massachusetts are not available to a citizen and resident of North Carolina. The petitioner here was guided by what reasonably appeared to be the procedural law of North Carolina. As amply demonstrated in the Petition (p. 33), as well as by the North Carolina Supreme Court's exhaustive discussion of the subject (App. B, p. 11a), mandatory injunction—the action brought by Nectow—is not available to a property owner seeking to test the validity of a North Carolina zoning ordinance. The remainder of respondent's contentions on this point are fully discussed in the Petition.

CONCLUSION

It is respectfully submitted that the respondent's Brief in Opposition contains no discussion of the facts or of the legal issues involved, sufficient to negate, or overcome, the urgent reasons set forth in our Petition for review by this Court of the constitutional questions involved.

Respectfully submitted,

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